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DONATIO CAUSA MORTIS.

THE DOCTRINE THAT A CONTINUED POSSESSION BY THE DONEE, AFTER THE ALLEGED GIFT, SIMILAR TO THAT BEFORE THE ALLEGED GIFT, IS NOT SUFFICIENT DELIVERY TO CONSTITUTE A VALID GIFT CAUSA MORTIS—HOW THIS DOCTRINE IS APPLIED IN *Davis* v. *Kuch* (1904), SUPREME COURT OF MINNESOTA, AND IN *Drew* v. *Haggerty* (1889), SUPREME COURT OF MAINE—*Davis* v. *Kuch* AND *Drew* v. *Haggerty* COMPARED.—COMMENTS.

Davis v. *Kuch*. Supreme Court, Minnesota. November 4, 1904. Appeal from District Court, Renville County. Gorham Powers, J. Action by Merton Davis v. Henry Kuch. Verdict for plaintiff. From an order denying a new trial defendant appeals. The facts of the case follow:

William Davis, father of plaintiff below, had cancer and was confined to his bed at his residence. He and his family lived on his farm, and William Davis a few months prior to his death had executed a will by which he bequeathed all his real estate to the children of his second marriage, subject to a life estate in the mother. Thus no provision was made by the will for plaintiff and his brother, children of Mr. Davis' first marriage. At the trial plaintiff's brother testified that about five days before Mr. Davis' death, while he was in a serious condition and had been confined to his bed already about two and a-half weeks, the following conversation took place in the presence of plaintiff and his brother and their stepmother:

Q. What was said at the time by your father and brother regarding this team?
A. He said to my brother he had never given him anything; he would give him that team.
Q. What did your brother say?
A. My brother said he would take the team.

The team, which was the subject of the controversy, during Mr. Davis' life was kept in the one barn on the premises and was fed from the common supply. It was used by the father up to the time of his sickness. Plaintiff, who had been home off and on since he became of age seven years before Mr. Davis' death, came home during the first week of his father's illness and remained with him until his death. During this time plaintiff cared for and fed the team and the day after the alleged gift used the team to drive to a nearby village for medicine for his father. There was nothing further done, however, during the father's lifetime to indicate delivery and acceptance of the team as a gift.

After his father's death plaintiff arranged with his brother to care for the team, for which he would receive compensation during plaintiff's absence. Plaintiff stated he would return shortly. Soon after his departure the widow claimed the team as part of the personal estate, and it was set aside as part of her allowance. Defendant claimed title through the widow and refused to deliver the team, whereupon this action of replevin was brought to secure possession.

* * * * * * * * * *

The Court below submitted to the jury the question whether or not there had been a gift of the property to the plaintiff and instructed them as follows: To constitute a gift there must have been a delivery of the property, but that in such case no absolute rule can be laid down as to what constitutes sufficient delivery. The subject matter of the gift must be considered in determining the character of delivery required.

In this case Mr. Davis was bedridden, thus could not go out and indicate the team in question, and make any sort of a formal delivery.

The plaintiff was Mr. Davis' son, and had been accustomed to reside with his father frequently and had been in fact residing with him prior to and during the time of making the alleged gift; and under such circumstances, the law does not require the same formality as to delivery as it might in some other cases.

"Thus, where a donor and donee * * * * * reside together, as in case of husband and wife, parent and child, it is not necessary that things given should be removed from their common residence. It is sufficient if it appear that the donor has relinquished and the donee acquired control of the property."

Thus under such circumstances, a formal delivery is not necessary, and if in the jury's estimation a sufficient delivery had been made, the title would pass to the plaintiff. * * * *

The correctness of this discussion is called in question.

I. In deciding the question Judge Lewis first considered whether a gift inter vivos or causa mortis was established.

(1.) To constitute a gift inter vivos there must be freedom of will, the gift must be complete and irrevocable and must go into immediate and absolute effect; the donor must be competent to contract; and the property must be delivered by the donor and accepted by the donee. In other words, the gift must be voluntary, gratuitous and *absolute,* and must be delivered and accepted. 14 Am. & Eng. Ency. of Law (2d Ed.), 1015, and cases there cited.

(2.) Redfield on Wills (Sec. 42) gives the following definition of a gift causa mortis:

"A gift of personal estate, made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring substantially as expected by the donor (*i.e.,* if donor does not in fact die, gift is revoked), and that the same be not revoked before death."

(3.) By this it is seen that the two forms of gifts are practically the same in their requisites. Both must be voluntary, gratuitous and complete, and there must be delivery and acceptance. The one great distinction between the two is that gifts inter vivos must be complete, absolute and irrevocable; while gifts causa mortis though complete, are not absolute and irrevocable, but conditional, taking effect only upon the death of grantor, who may revoke such gift any time before death and which are in fact revoked without his agency, if he does not die.

(4.) Judge Lewis then proceeds to weigh the circumstances of the gift and the condition of donor at the time of the alleged making of it. According to the evidence it is seen that the donor was a doomed man laboring under a deadly disease—cancer; he was confined to his bed and had been some two and a-half weeks before the alleged gift; he was gradually getting weaker and his death was the subject of conversation.

Therefore there can be very little doubt that the gift was made in contemplation of approaching death, with the implied condition that it would be revoked if donor should recover. This gift must be treated, then, as causa mortis.

(5.) Judge Lewis here discusses the use of the words "would give" and "would accept" (as used by Mr. Davis and plaintiff, respectively), with reference to an implied future gift rather than an actual one at the time of the conversation. He decides that these are rather the words of the witness than those of the parties to the gift,—and that the words must be taken to signify an immediate intention to make the gift and accept it on the part of the donor and donee respectively.

(6.) The defendant relied on *Allen* v. *Allen,* 75 Minn. 116, as authority that according to the facts of the present case there was not sufficient acceptance and delivery of the property to make it a valid gift causa mortis. But Judge Lewis distinquishes the two cases by pointing out that in *Allen* v. *Allen* the donee neither accepted the gift at the time it was conferred nor exercised any acts of ownership over the property prior to donor's death, while in the present case it was expressly stated in plaintiff's brother's testimony that plaintiff accepted the gift at the time of father's making it and continued in possession of it to extent of feeding and caring for team as usual.

(7.) And now Judge Lewis comes to a point where he decides quite flatly in opposition to the well-known case of *Drew* v. *Haggerty,* 81 Me. 231.

Judge Lewis puts the proposition: "It may be conceded that the donee's acts signifying dominion over the property did not differ in any respect from those preceding the conferring and accepting of the gift,—that he continued to feed and care for the team as before.

"But does that make any difference, if such continued possession and exercise of dominion were all incidental to and not inconsistent with ownership?"

Drew v. *Haggerty* answers this question flatly in the affirmative, while Judge Lewis answers it just as flatly in the negative.

Drew v. *Haggerty* holds that continued possession of the same character after the conferring of a gift causa mortis as that before the conferring of the gift will not constitute de-

livery. In other words, to the question: "Does it make any difference that the character of the possession was the same after the gift as it was before? *Drew* v. *Haggerty* would answer: Yes, it does make a difference; in such cases there would be no delivery; while Judge Lewis would answer: No, it makes no difference.

Exercise of possession and dominion over the gift *after* the conferring of it, even though such exercise is similar to that before the conferring of the gift, constitutes a delivery; and such delivery is just as effective as though the exercise of possession and dominion *after* the gift differed from that *before* it.

The Judge here cites *Cain* v. *Moon*, 2 Q. B. Div. 283, as being in concurrence with his position.

Proceeding he says: "While true, a stricter rule should be applied as to delivery in the case of a gift causa mortis than with reference to gifts inter vivos, yet, as in this case, *when it appears that the gift was made in good faith, and the only question is the sufficiency of delivery,* we think it was fairly a question for the jury to determine from all the facts and circumstances of the case whether there was a sufficient acceptance and delivery. There was no error in the instruction of the Court upon this branch of the case. The charge was ample, and stated the law correctly."

II. On the second branch of the record Judge Lewis holds that there was no evidence whereby the Court was called upon to submit the charge to the jury that the burden of proof was upon the plaintiff to show that the gift was not obtained by undue influence, or that there was evidence in the case that the father was of feeble mind.

III. The lower court was requested by defendant to charge:

(1.) "The jury are instructed that, in order to constitute a valid gift, there must be a taking possession under the gift; (2) that the taking of the team for the purpose of going for medicine was not necessarily a taking possession."

Judge Lewis said since the Court had already decided that a continued possession was sufficient to constitute a delivery, no new act under the gift was necessary; therefore, the first part was rightly refused. As to second part, it was immaterial anyhow. There would have been no harm in submitting it as the jury had a right to weigh all facts and circumstances, and that the mere act of going for medicine with the team might not of itself constitute sufficient taking possession, but as it was merely one of the acts of continued possession, and as there was evidence of many other such acts, the consideration of that single one was of no importance.

Order affirmed.

The facts in *Drew* v. *Haggerty* are as follows:

A husband made deposits in three savings banks, upon the account of both himself and wife, of moneys which consisted of their joint earnings for six years. The wife had kept the bank books in her trunks for four years previous to her husband's death.

There was evidence to show that he had given her the whole of the three funds orally, while on his death-bed. The plaintiff sues as administrator of the husband's estate, claiming (inter alia) that this death-bed gift was invalid, there being insufficient delivery and acceptance to constitute a valid gift causa mortis. Counsel for the defendant contended that since there was a clear intent to give, the books being in defendant's hands, the gift was executed and perfected *i. e.,* there was no need of defendant's taking the books out of her trunk and placing them in her husband's hands in order that he might formally give them back again to her. The husband recognized the fact that they were in her hands, where he had placed them. This seems at least sound common-sense reasoning, but in its decision the Supreme Court said (per Walton J):

"The most important question is whether the gift of a savings-bank book, from husband to wife, causa mortis, is valid without delivery, provided the book is at the time of the alleged gift already in the possession of the wife. The action (below) was tried before the Chief Justice and he ruled that to constitute a valid gift, causa mortis, there must be a delivery; that if the property be at the time already in possession of the donee, the donor's saying to the donee 'You may have it,' or 'You may keep it—it is yours,' does not pass the property in the case of a gift, causa mortis. We think this ruling is correct."

This decision seems distinctly unjust at first glance. To say that the dying husband must go through the formality of actually handing the bank-books to his wife in order that her possession might become valid seems, at any rate in this particular case, absurd. However, a little further along in his opinion, Judge Walton says:

* * * * * * * * * *

"Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will; and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity and distinguishes idle talk from serious purpose. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. * * * * Gifts causa mortis ought not to be encouraged. They are often

sustained by fraud and perjury. * * * It is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury."

Now this is certainly eminently sound and logical reasoning, both from a lay and legal point of view. The decision seems perfectly correct; though it may be hard in this particular case.

Yet, in view of the circumstances, so does the decision in *Davis* v. *Kuch* appear to be perfectly just and correct.

But the two cases give flatly opposite answers to the question: Does it make any difference that the character of the possession was the same after the gift as it was before?

It must be admitted that *Drew* v. *Haggerty,* strictly speaking represents the best law on this point; however, if this rule had been strictly adhered to by Judge Lewis, in *Davis* v. *Kuch,* we would have been brought to the absurd position of saying that either a sick man must arise and making his way to the barn, formally present his son with the team of horses, or that the son must immediately, on his father's oral gift, announce formally to the world at large in some manner, which I for one would be at a loss to indicate, that he has accepted the gift; that the team is his. And it is not likely that a person or persons, non-conversant with the law, would, at such a time, even *think* of going through any such actions, much less actually go through them.

* * * * * * * * * *

Which horn of the dilemma are we then to accept? Shall we say with Judge Lewis that when the gift takes place between husband and wife, or between members of a family or persons intimately connected in life, the rule must be relaxed?

This sentence occurs in *Drew* v. *Haggerty*:

"Now the law is even more particular about the evidence of delivery, when a gift is claimed between a wife and husband, or between members of a family where there is *an opportunity to create evidence falsely or the appearance of evidence" (and such opportunities to bring undue influence to bear).*

* * * * * * * * * *

This certainly cannot be disputed.

Here then, is the position: A well-recognized, well-established rule of law, resting firmly on precedent and authority.

A set of facts and circumstances which do not admit of having the rule strictly applied to them; else an absurd and unjust decision would result.

Rules of law must not be lightly cast aside. They are the well-tested, time-honored means to the end of justice, which

men have found reliable through long use. But when a rule fails us as a means to a desired end must we not lay it aside, or at least make the exception that perchance may prove the rule?

Let *Drew* v. *Haggerty* and *Davis* v. *Kuch* stand then; opposite each other, indeed, but perhaps by their very contrast serving the better to light that obscure path by which we grope for that which, in the last analysis, we are striving for—namely, Justice.

Joseph Chapman.